

Message Text

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ORIGIN L-02

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CU-02 CIAE-00 EUR-12 PM-03 INR-07 ACDA-05 NSAE-00

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FM SECSTATE WASHDC

TO USMISSION GENEVA PRIORITY

C O N F I D E N T I A L STATE 024119

E.O. 11652: GDS

TAGS: PFOR, CSCE

SUBJECT: CSCE: POTENTIAL LEGAL PROBLEMS

REF: A. GENEVA 495; B. GENEVA 496; C. STATE 13704;
D. GENEVA 487

1. REFTELS A AND B STATE THAT, IN VIEW OF THE STRONG OPPOSITION OF OUR ALLIES, IT IS FRUITLESS TO PURSUE FURTHER THE IDEA OF A COORDINATING COMMITTEE RESOLUTION OR CHAIRMAN'S STATEMENT AS SUGGESTED REFTEL C. WE REGRET THIS STATE OF AFFAIRS BECAUSE WE FEEL THAT THIS BLANKET SOLUTION WOULD HAVE THE ADVANTAGES OF MAKING CSCE RESULT EASIER TO EXPLAIN TO US PUBLIC OPINION AND POSSIBLY LESS CONTENTIOUS IN ANY FOLLOW-UP DISCUSSIONS.

2. WE NOTE CERTAIN ALLIES SUGGESTED IN REF A THAT
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OUR CONCERN MIGHT BE MET BY INSERTION IN FINAL ACT

OF LANGUAGE ON LEVEL OF COMMITMENT OR A FEDERAL-STATE RESERVATION. WE CONCUR THAT, THOUGH THESE SUGGESTIONS, PARTICULARLY ANDRE'S, WOULD BE HELPFUL FROM A LEGAL STANDPOINT, THEY ARE PROBABLY NON-STARTERS AND IN ANY EVENT WILL COME TOO LATE IN THE DAY TO REPRESENT RELIABLE SOLUTIONS. HOWEVER, IF THESE IDEAS ARE LATER RENEWED, DEPARTMENT WOULD BE INTERESTED AND SHOULD BE PROMPTLY ADVISED.

3. IN THE ABSENCE OF AGREEMENT OF ALL PARTICIPANTS THAT ALL CSCE DOCUMENTS ARE OF A MORALLY BINDING CHARACTER AND NOT LEGAL TEXTS, DEPARTMENT INTENDS TO CONSTRUE EACH OF CSCE DOCUMENTS AS WE DEEM PROPER. THIS MAY WELL LEAD TO A SITUATION WHERE PARTICIPANTS HAVE DIFFERING VIEWS OF THE LEVEL OF COMMITMENT OF A PARTICULAR TEXT. THOUGH THIS WOULD BE AN UNUSUAL OUTCOME, WE RECOGNIZE VALIDITY OF THE POLITICAL CONSIDERATIONS ADVANCED BY DELEGATION IN SUPPORT OF THIS RESULT. EVENTUAL US VIEW OF DOCUMENTS WILL DEPEND, OF COURSE, ON CONTENT OF DOCUMENTS YET TO BE DRAFTED. IT MAY STILL BE THAT CONFERENCE RECORD AS A WHOLE OR CERTAIN FUTURE TEXTS WILL SUPPORT THE VIEW THAT ALL CONFERENCE TEXTS ARE LEGALLY NON-BINDING. ON THE OTHER HAND, DEPENDING ON WORDING OF THE FINAL ACT, IF ONE EXISTS, AND OTHER TEXTS, WE MIGHT WISH TO REGARD ENVIRONMENT TEXT, AND PERHAPS EVENTUALLY ONE OR TWO OTHERS, AS AGREEMENTS AND THE REMAINING TEXTS AS NON-BINDING RECOMMENDATIONS OR DECLARATIONS.

4. SUCH A RESULT, THOUGH LESS THAN PERFECT AS NOTED ABOVE, WOULD BE ACCEPTABLE AS LONG AS NONE OF THE DOCUMENTS WHICH WE WOULD CONSTRUE AS AGREEMENTS GO BEYOND EXECUTIVE BRANCH COMPETENCE OR CONFLICT WITH US LAW. THE ONLY TEXTS WHICH HAVE TO DATE CAUSED CONCERN IN THIS REGARD ARE THE MARRIAGE AND FAMILY REUNIFICATION TEXTS, WHICH WOULD POSE PROBLEMS IF THEY WERE VIEWED AS AGREEMENTS. WHETHER OR NOT THESE TEXTS MIGHT BE VIEWED AS AGREEMENTS DEPENDS ON THE FINAL WORDING OF THE PREAMBLE TO THE HUMAN CONTACTS TEXT WHICH IS STILL UNDER NEGOTIATION (REF D). AS
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DEPARTMENT STATED IN REF C, PRESENT TEXTS FOR THIS PREAMBLE ARE AMBIGUOUS AS TO THE LEVEL OF COMMITMENT INTENDED. HOWEVER, SINCE OUR ALLIES CONTINUE TO TAKE THE UNANIMOUS VIEW THAT THIS PREAMBLE IS NOT INTENDED TO PRODUCE LEGALLY BINDING COMMITMENTS, DEPARTMENT CAN ACCEPT CONSTRUING THE AMBIGUITY IN FAVOR OF CONSIDERING THIS LANGUAGE AS ONLY MORALLY AND NOT LEGALLY BINDING. HOWEVER, IF WE ARE TO MAINTAIN THIS

CONCLUSION, DELEGATION MUST BE ESPECIALLY VIGILANT TO SEE THAT, AT THE VERY LEAST, THE PRESENT AMBIGUITY REMAINS AND NO NEW LANGUAGE IMPLYING AGREEMENT IS INCORPORATED INTO TEXT. TO STRENGTHEN OUR POSITION, DELEGATION SHOULD GIVE SUPPORT WHENEVER FEASIBLE TO ANY CHANGES IN TEXT WHICH WOULD MAKE CLEARER ITS MORAL AS OPPOSED TO LEGAL CHARACTER. IN THIS REGARD, RETENTION OF PHRASES "MAKE IT THEIR AIM" IN PENULTIMATE PARA AND "INTENTION TO APPLY THE FOLLOWING" IN FINAL

PARA ARE MOST HELPFUL AND MUST BE RETAINED. IF DELEGATION HAS DOUBTS AS TO IMPACT OF CERTAIN SUGGESTED NEW LANGUAGE, IT SHOULD SEEK DEPARTMENT GUIDANCE. SIMILAR CARE SHOULD BE TAKEN THROUGHOUT ALL OTHER TEXTS TO AVOID UNAMBIGUOUS LANGUAGE OF COMMITMENT, OBLIGATION OR AGREEMENT WITHOUT SECURING DEPARTMENT APPROVAL. DELEGATION SHOULD NOT AGREE TO ANY TEXTS WHICH VIOLATE THIS STANDARD WITHOUT AUTHORIZATION AND SHOULD SEEK TO HEAD OFF DEVELOPMENTS IN THAT DIRECTION.

5. AS DEPARTMENT STATES IN REF C, WE WOULD PREFER TO HAVE SOME OBJECTIVE EVIDENCE ON THE RECORD THAT AMBIGUOUS LEVEL OF COMMITMENT LANGUAGE WAS NOT INTENDED TO CREATE LEGALLY BINDING AGREEMENTS. IF TEXT RESULTING FROM NEGOTIATIONS ON HUMAN CONTACTS PREAMBLE LOSES ITS AMBIGUITY AND SUGGESTS THAT LEGAL AGREEMENTS HAVE BEEN CREATED, DEPARTMENT WILL WANT TO RECONSIDER POSSIBILITY OF A UNILATERAL STATEMENT, AS SUGGESTED BY SEVERAL ALLIES (REF A), TO THE EFFECT THAT HUMAN CONTACTS PREAMBLE TEXT IS ONLY OF A MORALLY BINDING NATURE. IN THIS EVENT, WE WOULD CONCUR WITH DELEGATION'S VIEW (REF B) THAT SUCH A STATEMENT SHOULD BE MADE TOWARD THE END OF STAGE II. ALLIES MAY BE ADVISED THAT
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DEPARTMENT WILL CONSIDER NECESSITY OF SUCH A STATEMENT IN THE LIGHT OF SUBSEQUENT NEGOTIATIONS, AND IN PARTICULAR HUMAN CONTACTS PREAMBLE.

6. ON THE ASSUMPTION THAT HUMAN CONTACTS PREAMBLE WILL ALLOW AN INTERPRETATION THAT TEXTS ARE ONLY MORALLY BINDING, DEPARTMENT DOES NOT THINK THAT AMENDMENTS TO FAMILY REUNIFICATION TEXT DESCRIBED REF B ARE NECESSARY AT THIS TIME.

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